Ananda Dharmalingam v Chantella Honeybee Sargon (P) and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W–02–728 OF 2005, W–02–1260 OF 2004, W–02–898 OF 2005 AND W–02–899 OF 2005
MOKHTAR SIDIN, HASHIM YUSOFF AND ZULKEFLI JJCA
27 DECEMBER 2006

Family Law — Children — Custody — Application for variation of custody order — Respondent wife's fitness as a mother — Fresh psychiatric evaluation on the respondent wife shows her to be a fit mother — Variation order reverting custody back — Whether principle of estoppel apply

The petitioner husband is appealing against the decision of the High Court dated 13 June 2005 in varying the custody order dated 14 October 2003 and giving custody of the two children to the respondent wife. When the appeal cases first came up for hearing on 9 May 2006, the Court of Appeal had directed a fresh psychiatric evaluation on the respondent wife and by way of a consent order, on the two children of the marriage be assessed or evaluated by an independent child psychiatrist to be submitted to the court. There were two current reports on the respondent wife which reports unequivocally state that the respondent wife does not suffer from depression or any mental illness and is a fit mother. These two current reports were the basis for the learned judge of the High Court on 13 June 2005 to revert custody of the two children back to the respondent wife. It was Dr Chin's first report in October 2000 which stated that the respondent wife was diagnosed as suffering from the mental illness of major depression that formed the basis of the High Court decision to grant custody of the children to the petitioner husband. Dr Chin had re-evaluated the respondent wife and found that there was no evidence of symptoms of depression or anxiety. On the evalution of the children, the independent child psychiatrist stated that the children wanted to be with their mother. Learned counsel for the petitioner husband raised as a ground of appeal the doctrine of estoppel against the respondent wife from challenging or contradicting the said order of 14 October 2003 on the basis that the High Court then had accepted the diagnosis of Dr Chin on the respondent wife's illness of major depression as the most accurate and reliable.

Held:

(1) With that report, there could be no more doubt on the respondent wife's fitness as a mother and be given the custody of the children (see para 11).

(2) The principle of estoppel does not apply to children's cases especially in this case when there is a variation order reverting custody back to the respondent wife on grounds that there has been material change in the circumstances since the ex parte order was granted. It must also be noted that the law presumes that

the child under seven years of age should be under the custody care and control of his mother and the elder boy above seven who refused to be separated from the younger brother should also be given to the mother (see para 12).

(3) The court has a duty under the Child Act 2001 to protect the children who are obviously emotionally or physically injured. Both the children have shown signs of emotional injury as can be seen from the reports. On the importance of taking into consideration the children's wishes and how a court should sensitively handle a situation when children rebel against a parent and refuse to see that parent (see paras 14–15); *Churchard v Churchard* (1984) FLR 635 followed.

(4) The reality had to be acknowledged in that the two children in this case could not be compelled to see their father under the present circumstances. The petitioner husband must accept that. The ongoing fight over the custody and access of the two children between the petitioner husband and the respondent wife was a futile exercise and this should stop. It was certainly not the intention of the learned judge to have the petitioner husband as the father of the two children 'debarred' from access in the sense that he is unsuitable. The situation was that access simply could not be made to work at the present time until the two children recover from the trauma of the past events that they had gone through (see para 20).

[Bahasa Malaysia summary

Pempetisyen suami merayu terhadap keputusan Mahkamah Tinggi bertarikh 13 Jun 2003 dalam mengubah perintah jagaan bertarikh 14 Oktober 2003 dan memberikan jagaan kedua-dua anaknya kepada responden isteri. Apabila kes ini didengar buat pertama kali pada 9 Mei 2006, Mahkamah Rayuan telah memerintahkan satu penilaian psikiatri yang baru ke atas responden isteri dan melalui satu perintah persetujuan, satu penilaian ke atas kedua-dua anak daripada perkahwinan tersebut oleh psikiatri kanak-kanak yang bebas diserahkan ke mahkamah. Terdapat dua laporan-laporan yang masa kini atas responden isteri di mana laporan-laporan tersebut dengan jelas menyatakan responden isteri tidak mengalami kemurungan ataupun sebarang kehilangan akal dan adalah seorang ibu yang sesuai. Kedua-dua laporan yang terkini ini merupakan asas di mana hakim Mahkamah Tinggi yang bijaksana pada 13 Jun 2005 mengembalikan jagaan kedua-dua anak tersebut kepada responden isteri. Ia merupakan laporan pertama Dr Chin di Oktober 2000 yang menyatakan bahawa responden isteri didiagnosis sebagai mengalami penyakit mental yang disebabkan oleh kemurungan yang teramat sangat yang menyebabkan keputusan Mahkamah Tinggi memberikan jagaan kedua-dua anak tersebut kepada pempetisyen suami. Dr Chin kini telah menilai semula dan mendapati bahawa tiada bukti tanda-tanda kemurungan atau kerisauan yang dialami responden isteri. Berhubungan dengan penilaian ke atas kanak-kanak tersebut, psikiatri kanak-kanak yang bebas menyatakan bahawa kanak-kanak tersebut ingin bersama ibu mereka. Peguamcara pempetisyen suami membangkitkan doktrin estopel sebagai alasan rayuannya terhadap responden isteri daripada mencabar dan menentang perintah bertarikh 14 Oktober 2003 atas alasan bahawa mahkamah tinggi telah menerima

diagnosis Dr Chin ke atas penyakit responden isteri iaitu kemurungan yang teramat sangat sebagai yang paling tepat dan boleh dipercayai.

Diputuskan:

(1) Melalui laporan-laporan tersebut, tiada lagi keraguan atas kesesuaian responden isteri sebagai seorang ibu dan boleh diberikan jagaan ke atas kedua-dua anak tersebut (lihat perenggan 11).

(2) Prinsip estopel tidak terpakai kepada kes kanak-kanak terutama dalam kes ini di mana terdapat variasi terhadap perintah memberikan semula jagaan kepada responden isteri atas alasan-alasan bahawa terdapat perubahan yang material di dalam keadaan semenjak perintah ex parte tersebut diberikan. Ia juga harus diteliti bahawa undang-undang menganggap bahawa seseorang kanak-kanak yang berumur di bawah tujuh tahun, penjagaan dan kawalan ke atas kanak-kanak harus diberikan kepada ibunya dan anak yang lebih tua tersebut yang berumur melebihi tujuh tahun enggan dipisahkan daripada adiknya harus juga diberikan kepada ibunya (lihat perenggan 12).

(3) Mahkamah mempunyai kewajipan di bawah Akta Kanak-Kanak 2001 untuk melindungi kanak-kanak yang dengan jelasnya mengalami kecederaan secara emosi atau fizikal. Kedua-dua kanak-kanak tersebut menunjukkan tanda-tanda kecederaan emosi seperti yang dapat dilihat daripada laporan-laporan tersebut. Kepentingan dalam mengambil kira kehendak-kehendak kanak-kanak tersebut dan bagaimana mahkamah harus menghadapi situasi sekiranya kanak-kanak menentang terhadap ibu atau bapanya dan enggan menemui ibu atau bapanya (lihat perenggan 14–15); *Churchard v Churchard* (1984) FLR 635 diikut.

(4) Hakikat harus diterima bahawa dalam keadaan sekarang ini, kedua-dua kanak-kanak dalam kes ini tidak boleh dipaksa untuk menemui bapa mereka. Pempetisyen suami harus menerimanya. Pergaduhan atas penjagaan dan akses yang berterusan adalah satu usaha sia-sia sahaja dan harus diberhentikan. Ia bukannya niat hakim yang bijaksana 'menghalangkan' akses kepada pempetisyen suami sebagai bapa kepada kedua-dua kanak-kanak itu yang bermaksud bahawa pempetisyen suami adalah tidak sesuai. Keadaan ialah akses sememangnya tidak dapat dijalankan buat masa kini sehingga kedua-dua kanak-kanak beransur pulih daripada trauma kejadian-kejadian yang lepas yang mereka lalui (lihat perenggan 20).]

Notes

For cases on custody of children, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2969–3002.

Cases referred to

B, Re (Children Act Proceedings) (Issue Estoppel) (1997) 1 FLR 285 (folld)
Churchard v Churchard (1984) FLR 635 (folld)

Legislation referred to

Child Act 2001 ss 17(1)(a)(b)(g)(h), 17(2)(b)
Law Reform (Marriage and Divorce) Act 1976 ss 88(2)(b), 89, 96, 100

Appeal from: Petisyen Pemisahan Penghakiman No S8–33–837 of 2000 (High Court, Kuala Lumpur)

Foo Yet Ngo (Faridah Abdullah with her) (YN Foo & Partners) for the petitioner husband.

Chew Swee Yoke (Walter Pereira with her) (Kamarudin & Partners) for the respondent wife.

Zulkefli JCA (delivering judgment of the court):

INTRODUCTION

[1] There are four related appeal cases; Nos W–02–1260 of 2004, W–02–728 of 2005, W–02–898 of 2005 and W–02–899 of 2005 fixed for hearing before us arising from the suit for the custody of the two children of the marriage involving the petitioner husband and the respondent wife. In Appeal Case No W–02–1260 of 2004 ('Appeal No 1'), the respondent wife is appealing against the decision of the High Court dated 9 November 2004 in refusing to grant an order of interim maintenance of the two children against the petitioner husband. In Appeal Case No W–02–728 of 2005 ('Appeal No 2'), the petitioner husband is appealing against the decision of the High Court dated 13 June 2005 in varying the custody order dated 14 October 2003 and giving custody of the two children to the respondent wife. In Appeal Case No W–02– 898 of 2005 ('Appeal No 3') the petitioner husband is appealing against the decision of the High Court dated 9 Ogos 2005 in dismissing the application by the petitioner husband under s 100 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') to submit the two children for an expert examination and evaluation by a child psychiatrist. In Appeal Case No W–02–899 of 2005 ('Appeal No 4'), the respondent wife is appealing against the decision of the High Court dated 5 July 2005 in allowing the application of the petitioner husband for an order of stay of execution of the custody order dated 13 June 2005.

FACTS OF THE CASE

[2] The relevant background facts of the case and the chronology of events involving the petitioner husband and the respondent wife are as follows:

(a) The petitioner husband and the respondent wife were married on 18 July 1991 in Melbourne, Australia and subsequently registered the marriage in Petaling Jaya, Selangor, Malaysia. On 10 August 2000, the petitioner husband filed a petition for judicial separation and by way of ex parte summons in Chambers applied for the custody of the two children of the marriage.

(b) The High Court in Kuala Lumpur heard the ex parte application on 18 August 2000 and granted custody and control of the two children of the marriage, Alexander Ishwara Dharmalingam ('Alexander') born on 13 November 1992 and Callum Amrish Dharmalingam ('Callum') born on 29 January 1996 to the petitioner husband together with an injunction restraining the respondent wife from taking the children out of the petitioner husband's custody and control

and from the jurisdiction of the court. The respondent wife was allowed access to the children which will be varied yearly.

(c) On 15 April 2003, the respondent wife held the two children during the period of access given to her and ever since had denied the petitioner husband from meeting the children.

(d) On 14 October 2003 after a full trial, the High Court again granted custody and control of the two children to the petitioner husband. An injunction against the respondent wife from taking the children away from the petitioner husband and outside the jurisdiction of the court was also endorsed and continuing ('the second order').

(e) On 8 December 2004, the respondent wife filed an application at the High Court to vary the second order, whereby she applied for custody of the two children and that she be allowed to bring the children to stay with her in Australia. The respondent wife had also exhibited an application for her brother and sister-in-law be appointed as the guardian to her children. On 13 June 2005, the High Court made the following orders:

(i) custody of the two children be given to the respondent wife.

(ii) no access to the two children be given to the petitioner husband until a child psychiatrist has certified that the children are ready and prepared to meet the petitioner husband.

(iii) the petitioner husband to return the passports of the children to the respondent wife; and that the respondent wife be allowed to bring the children to Australia for a maximum period of one month for every visit, pending the petitioner husband's application to refer the children to a child psychiatrist.

(iv) the petitioner husband to pay the respondent wife monthly maintenance equivalent to 20% of his gross income and the petitioner husband to pay for the education and the medical fees of the two children.

ORDERS OF THE COURT OF APPEAL ON 9 MAY 2006

[3] When the four appeal cases first came up for hearing on 9 May 2006, we had directed that a fresh psychiatric evaluation on the respondent wife by Dr Chin Cheuk Ngen ('Dr Chin') be submitted to this Court. There were two current reports on the respondent wife by Professor Hussain bin Habil of Universiti Malaya Specialist Centre and Professor T Maniam of Hospital UKM which reports unequivocally state that the respondent wife does not suffer from depression or any mental illness and is a fit mother. These two current reports were the basis for the learned judge of the High Court on 13 June 2005 to revert custody of the two children back to the respondent wife by way of the respondent wife's variation application at the court below which decision is the subject of the petitioner husband's appeal herein.

[4] The latest report of Dr Chin confirms the findings of Professor Hussain bin Habil and Professor T Maniam. It was Dr Chin's first report in October 2000 which stated that the respondent wife was diagnosed as suffering from the mental illness of

major depression that formed the basis of the High Court decision to grant custody of the children to the petitioner husband. Dr Chin has now re-evaluated the respondent wife and has found that there is no evidence of symptoms of depression or anxiety and concludes, 'In summary Madam Chantella's current mental state is normal. She is well.' The respondent wife has been well for six years now as attested by Professor Hussain bin Habil and Professor T Maniam.

[5] This court also on 9 May 2006 by way of a consent order, directed that the two children of the marriage be assessed or evaluated by an independent child psychiatrist and that the report be submitted to this court. The independent child psychiatrist, Dr Rose Peng, has forwarded her exhaustive reports on the two children which stated that the children wanted to be with their mother. Dr Rose Peng also finds that the children though very attached to their mother have suffered from the emotional harm that the custody proceedings have done to them. Dr Rose Peng in her report recommends it is important for the children, as is their wish, to be with their mother to move on in life and concluded by stating as follows:

> As a professional independent assessor for these children, I have seen the pain in them and I hope that I have conveyed appropriately the sufferings these children had gone through in this report. I have real concerns of their future emotional wellbeing should this court case drags on any longer. They have to move away from all this threat to their basic sense of security, that is to be with their mother, they have to move on in their life as soon as possible; only then they can have any chance of healing. For the sake of these children, without any fear or favor to any of their parents, I appeal to all to please help stop this court case as soon as possible. Anyone's desire or further attempt to want to remove them from their mother, after knowing what price these children would have to pay, would be for no other reasons other than malice towards them.

DECISION OF THE COURT ON APPEAL

[6] We would approach the four appeal cases before us by dealing with Appeal No 2 and Appeal No 3 together as these two appeals are inter related on the contested issue of custody of the two children of the marriage.

[7] It is to be noted at the outset that the petitioner husband and the respondent wife went through a protracted inter partes interim custody hearing in the High Court which lasted from September 2000 until the judgment of her Ladyship Rahmah Hussain J (as she then was) on 14 October 2003 which gave custody of the two children to the petitioner husband. In arriving at her decision, the learned trial judge had preferred the medical report of Dr Chin, the psychiatrist, then recommended by the petitioner husband and his family to determine the fitness of the respondent wife as a mother to the two children. In all, five psychiatrists including the two professors called by the respondent wife had given oral evidence. Dr Chin had then diagnosed the respondent wife as suffering from major depression.

[8] In our view, with respect the High Court's decision of 14 October 2003 was inexplicable because the learned Judge had preferred outdated reports of Dr Chin whose last consultation was in August 2000 and not the then current reports of two eminent psychiatry professors of Professor Hussain bin Habil of Universiti Malaya

Specialist Centre and Professor T Maniam of Hospital UKM given just before they gave evidence in court which was in January 2003. And this was so despite the fact that the same learned judge had recorded in her notes of evidence that the relevant state was the respondent wife's current state and that Dr. Chin himself had said the best person to comment on the respondent wife's state of mind was her current doctors (Professor Hussain and Professor Maniam). The respondent wife appealed against the High Court decision of 14 October 2003 and her appeal was heard by the Court of Appeal on 12 October 2004. Unfortunately, the Court of Appeal then decided that there was no appealable error committed by the High Court and therefore declined to intervene but not without twice making very broad hints in the judgment that the respondent wife was not without remedy regarding her current mental status (see the Court of Appeal grounds of judgment at pp 722–729 of the appeal record (Vol 2)).

NEW DEVELOPMENTS JUSTIFYING VARIATION ORDER BE GIVEN TO THE RESPONDENT WIFE

[9] During the trial at the High Court and before judgment on 14 October 2003, the two children rebelled and during access period given to the respondent wife one day in April 2003, they refused to return to the petitioner husband's house and since then have remained with the respondent wife. Both the High Court and the Court of Appeal have refused to order the respondent wife to deliver the children to the petitioner husband, the Court of Appeal twice ordering a stay of the High Court order dated 14 October 2003. By the time this state of position was brought before both the High Court and the Court of Appeal, there were already reports from the child psychiatrist Dr Nor Hamidah in 2003 and 2004 which confirmed that the children were emotionally injured by the forced separation since August 2000. In fact, what was most worrying was the fact that Alexander the elder boy wants to kill his father, the petitioner husband, and this had surfaced during the incident in May 2003 when the boys fought tooth and nail to resist the petitioner husband in their apartment when the petitioner husband tried to execute yet another ex parte order ordering the respondent wife to deliver the children to the petitioner husband (see the respondent wife's affidavit dated 8 May 2003 at pp 227–235 of the appeal record (Vol 1)). None of the current reports of the two professors and of Dr Nor Hamidah have been challenged credibly or on substantive grounds by any other specialist psychiatrist report that may be called or produced by the petitioner husband.

[10] We have also noted that the children have been interviewed by his Lordship Faiza Tamby Chik J before he made his decision on 13 June 2005 to vary the order dated 14 October 2003 (see pp 69–70 of the appeal record (Vol 1)). The children obviously have expressed their wishes under s 88(2)(b) of the Act. The learned judge did not find any brainwashing or parental alienation syndrome as alleged by the petitioner husband. On this point, we find no reason to disturb such findings made by the learned High Court judge.

[11] The respondent wife has further filed herein a recent affidavit dated 4 August 2006 annexing Dr Chin's current report on her mental state which shows she is well and normal and able to take care of the children. The obtaining of this report was directed by the order of this court dated 9 May 2006 when this appeal was first heard and adjourned pending the said report. In our view with that report, there can be no more doubt on the respondent wife's fitness as a mother and be given the custody of the children.

[12] Learned counsel for the petitioner husband in their submission against the variation of the custody order of 14 October 2003, raised as a ground of appeal the doctrine of estoppel against the respondent wife from challenging or contradicting the said order of 14 October 2003 on the basis that the High Court then had accepted the diagnosis of Dr Chin on the respondent wife's illness of major depression as the most accurate and reliable. It is our considered view that the principle of estoppel does not apply to children's cases especially in this case when there is a variation order reverting custody back to the respondent wife on grounds that there has been material change in the circumstances since the ex parte order was granted in August 2000. It must also be noted that the law presumes that the child under seven years of age (Callum) should be under the custody care and control of his mother and the elder boy above seven (Alexander) which refused to be separated from the younger brother should also be given to the mother. [On the principle that the doctrine of estoppel does not apply to children's cases, see the case of *Re B (Children Act Proceedings) (Issue Estoppel* (1997) 1 FLR 285].

[13] As regards the other grounds of appeal by the petitioner husband it is noted that the learned counsel wanted this court to revert back to the findings of the High Court in the original custody order dated 14 October 2003, ie acceptance of Dr Chin's diagnosis that the respondent wife was suffering from major depression and that Professor T Maniam's reports prepared in October 2000 were flawed and unacceptable. We are of the view that for the purpose of the present appeal these are irrelevant since the appeal now is in respect of the variation order dated 13 June 2005 where there were material changes of circumstances (see s 96 of the Act). The respondent wife's present healthy state was confirmed by her current doctors (both the professors). The petitioner husband's ground that Professor T Maniam's report in November 2004 is a continuation of his earlier reports is totally unjustified. Both the professors' reports prepared for the variation application were made after five years observation of the respondent wife since their first reports were prepared in October 2000. Both professors have given the respondent wife a clean bill of health. This is corroborated by Dr Chin's latest report filed herein as ordered by the Court of Appeal on 9 May 2006. There have been material changes in the circumstances as evidenced by the reports of Professor T Maniam and Professor Hussain in November 2004. We are of the view the learned High Court judge in granting the variation order took full cognizance of the said reports and the wishes of the children who have shown increasing maturity.

[14] We have to state here that the court has a duty under the Child Act 2001 to protect the children who are obviously emotionally or physically injured

(see s 17(1)(a)(b)(g)(h) and s 17(2)(b) of the Act). Both the children (Alexander and Callum) have shown signs of emotional injury as can be seen from the reports of Dr Nor Hamidah (see pp 505–515 of the appeal record (Vol 2)).

[15] On the importance of taking into consideration the children's wishes and how a court should sensitively handle a situation when children rebel against a parent and refuse to see that parent, we would like to refer to the case of *Churchard v Churchard* (1984) FLR 635 wherein the relevant facts of the case are as follows.

[16] The parties were married in 1965. There were two children of the marriage, both boys aged 10 and 8. The marriage broke down in 1977 when the father formed an association with another woman. When he told the mother he was leaving there was a violent altercation between the parties and the father received a number of stab wounds from the mother using a carving knife. The father left and, by agreement, the mother was granted custody of the boys and the father was granted defined access. In January 1978, the father made an application to the court complaining that access was not working properly and that the mother was not a suitable person to care for the children. A welfare report indicated that the mother was a caring and conscientious mother and that the problems over access were caused as a result of the strains and tensions at the handover for access; the father having great difficulty in controlling his feelings and sometimes failing to do so. The welfare officer made detailed recommendations as to access. Access was continued.

[17] The matter came before the court again in January and April 1979. Specific access was ordered, but it was not successful. In May 1979, when the father went to the house to collect the children they barricaded themselves in the loft and refused to come down. When the father subsequently attempted to see the children at the house they retreated to the loft and access had totally failed.

[18] The father applied to commit the mother to prison for disobeying the order as to access. He also applied for the custody of the children. The matter first came before the judge in July 1979. The judge adjourned the matter and requested a further welfare report. In October 1979, the matter was again adjourned and the mother was warned by the judge of the consequences of failing to comply with the order as to access. The children continued to frustrate access by retreating to the loft when the father came to the house. In January 1980, the judge decided to 'debar' the father from access and he dismissed the father's application for custody.

[19] The father appealed. His Lordship Ormrod LJ in delivering the judgment of the Court of Appeal in dismissing the appeal, inter alia, at p 639 had this to say on access:

> So far as access is concerned, the time has come, the judge thought and I think rightly, to say 'enough is enough'. Enough attempts and struggles have been gone through in the last 18 months or so and the only way of dealing with the case is to accept the situation as it is for whatever reasons. It does not matter what the reason for their behaviour is. It cannot

be in their interest that all this cumbersome machinery of the law should be put into operation in order to make boys of 10 and 8 do what they refused to do. It can only be slightly ridiculous.

[20] Likewise, in the present case we are of the view that the petitioner husband should accept the situation which has come about for whatever reasons. The reality has to be acknowledged in that the two children in this case cannot be compelled to see their father under the present circumstances. The petitioner husband must accept that. The ongoing fight over the custody and access of the two children between the petitioner husband and the respondent wife is a futile exercise and this should stop. In this case, we think the learned judge was perfectly right in the decision he came on the question of access wherein with regard to one of the orders he had made on 13 June 2005, he had directed that no access to the two children be given to the petitioner husband until a child psychiatrist has certified that the children are ready and prepared to meet the petitioner husband. In our view, it was certainly not the intention of the learned judge to have the petitioner husband as the father of the two children 'debarred' from access in the sense that he is unsuitable. The situation is that access simply cannot be made to work at the present time until the two children recover from the trauma of the past events that they have gone through.

[21] As regards the refusal of the trial judge on 13 June 2005 to grant the order as sought for by the respondent wife to allow her to take the children out of Malaysia to settle down in Australia, we will not deal with this issue in this appeal as there is no cross appeal filed on this issue by the respondent wife. The respondent wife is only invoking the court's jurisdiction under s 89 of the Act for us to consider making such an order. We do not wish to speculate the reason why the learned judge did not grant this particular order sought for by the respondent wife. We could only say that at that juncture when the learned judge made the order on 13 June 2005, there are still other ancillary matters involving the parties which have not been dealt with as yet such as the issue on maintenance of the two children. It is also worth mentioning that even up till now the petition for judicial separation between the two parties has not been heard and disposed of. At any rate, we take the view that the respondent wife is at liberty to apply and could still file an application sometime later at the suitable time for the grant of the order to allow her to take the children out of Malaysia to settle down in Australia.

CONCLUSION

[22] For the reasons already given, we would dismiss the petitioner husband's appeal in Appeal No 2 and Appeal No 3 with no order as to costs. All the orders of the learned judge of the High Court dated 13 June 2005 are hereby affirmed. With regard to Appeal No 1, we would dispose of the appeal by making an order that the case be remitted back to the High Court for a full hearing of all the issues on the claims of maintenance. Appeal No 4 has become academic in view of the fact that we have already heard and disposed of Appeal No 2 and is hereby struck out.

The deposits paid by petitioner husband and the respondent wife for all the four appeals before us are to be refunded to the respective parties.

Order accordingly.

Reported by Sally Kee